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AUG 30 2004

No. 04-144

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY CO.,
NORFOLK SOUTHERN RAILWAY CO.,
and NORFOLK SOUTHERN CORPORATION,

Petitioners,

v.

SHIRLEY ANDERSON, Individually and as
Executrix of the Estate of Lester Anderson, deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF OHIO,
EIGHTH APPELLATE DISTRICT,
CUYAHOGA COUNTY

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a general release attempting to limit a railroad's future liability for any and all injuries, known and unknown, is void under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 55, and thus cannot prevent an action for a separate injury to proceed that had not accrued at the time of the execution of the release.

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STATUTE INVOLVED

Congress enacted 45 U.S.C. § 5 (now § 55) of the FELA to prevent railroads from obtaining blanket waivers of liability for their harmful acts. 45 U.S.C. § 55 provides:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void.

Id.

In order for a release to be valid pursuant to § 55, a railroad carrier must not intend to exempt an employer from liability under the FELA but it must be a means of compromising a claimed liability of an existing controversy. *Callen v. Pennsylvania R.R. Co.*, 332 U.S. 625, 631 (1948). The application of § 55 to a release is a fact-bound analysis. *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690, 700 (3d Cir. 1998), *cert. denied*, 525 U.S. 1012. Furthermore, Congress' intent in passing the FELA was "to provide liberal recovery for injured workers." *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958). Moreover, viewing 45 U.S.C. § 55 liberally, as required, Congress intended it to have the "full effect that its comprehensive phraseology implies." *Id.* at 701 (*quoting Boyd v. Grand Trunk W. R.R.*, 338 U.S. 263 (1949)).

INTRODUCTION

Lester Anderson worked for the Nickel Plate Railroad Company from 1940 until 1961 as a sheet metal worker and pipe fitter. Mr. Anderson briefly left the railroad to serve in the United States Navy from 1944 to 1946. In 1961, Mr. Anderson began working at the New York Central Railroad Company as a sheet metal and maintenance worker until he left in 1964. Mr. Anderson worked with numerous asbestos-containing products during his employment with the two railroad companies, including insulation, packing, and gaskets.

In 1983, Mr. Anderson was diagnosed with the disease asbestosis. Asbestosis is a non-malignant scarring of the lungs caused by exposure to asbestos fibers. On November 20, 1984, Mr. Anderson brought suit against several parties, including the Petitioners herein, for damages incurred as a result of his asbestosis. On March 26, 1986, Lester and Shirley Anderson entered into a settlement agreement with the Defendants and signed a general, boiler-plate release, thereby terminating the litigation as to the Petitioners and disposing of Mr. Anderson's claim against them for asbestosis. Appendix to Petition for Writ of Certiorari ("Pet. App.") at 25a.

On January 9, 1998, Lester Anderson was diagnosed with pleural mesothelioma. Pleural mesothelioma is manifested as malignant tumors in the lining of the lungs. Mesothelioma is an extremely rare and incurable form of cancer which is caused by an individual's exposure to asbestos fibers. Mr. Anderson ultimately succumbed to his mesothelioma and passed away on April 9, 1998.

STATEMENT OF THE CASE

On March 29, 2000, Respondent, Shirley Anderson, individually and as Executrix of the Estate of Lester Anderson, brought suit against multiple parties seeking damages for the personal injury and wrongful death of her husband Lester Anderson as a result his contracting the disease mesothelioma, due to his occupational exposure to asbestos and asbestos-containing products. Lester Anderson was exposed to asbestos and asbestos-containing products in the scope and course of his employment with Defendants and/or their predecessor railroads.[1]

At the trial court and appellate levels, Petitioners claimed that Respondent's wrongful death and survival claims based on Mr. Anderson's death by mesothelioma were barred by the 1986 release from Mr. Anderson's asbestosis claim. The general, boiler-plate release signed by the Andersons in 1986 released the Petitioners from "any claims * * * of whatever kind" relating to Lester Anderson's employment that he "may now have or hereafter have * * * * relating in any manner to exposure to or ingestion of any substance whatsoever." Pet. App. at 25a. The Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County ("Eighth Appellate District"), however, held that the 1986 general release was void because it violated § 55 of the FELA, which explicitly precludes railroad employers from utilizing releases to avoid future liabilities for injuries to their employees. The Supreme Court of Ohio denied Petitioners' discretionary appeal of the decision of the Eighth Appellate

1. The Norfolk Defendants are sued as successors in interest to the Nickel Plate Railroad Company. American Financial Group, Inc. is sued as a successor in interest and/or liability to New York Central Railroad.

District, and a subsequent motion for reconsideration. Thereafter, Petitioners filed this Petition for Writ of Certiorari.

REASONS FOR DENYING THE PETITION

Petitioners claim that this Honorable Court should grant their Petition for Writ of Certiorari because the decision of the Court of Appeals of Ohio, Eighth Appellate District, Cuyahoga County ("Eighth Appellate District") is: (1) in direct conflict with United States Supreme Court precedent; (2) represents a conflict among the lower courts concerning the validity of FELA releases; and (3) it will further extend the already over-burdened asbestos docket, undermine incentives to settle claims and lead to forum shopping. Each of these contentions is without merit.

Quite simply, this case involves a release, drafted by the Petitioners, signed by the Respondent and her deceased husband, that impermissibly attempted to limit Petitioners' liability as railroad employers under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq*. This case involves a contract dispute between the parties to the release and as such is highly fact determinative.

The specific section of the FELA at issue herein is 45 U.S.C. § 55 which explicitly precludes railroad employers from utilizing releases to avoid future liabilities for injuries to their employees. The Eighth Appellate District properly held that the specific release at issue herein was void because it violated § 55 of the FELA.

As discussed more fully below, the decision of the Eighth Appellate District does not conflict with United States

Supreme Court precedent. Likewise, as discussed more fully below, the decision does not represent a conflict among the lower courts concerning the validity of FELA releases. Furthermore, Petitioners' concern with causing a floodgate of asbestos cases is purely speculative and without merit. In fact, mesothelioma is a rare disease that occurs only in a very small percentage of those individuals who were exposed to asbestos.

The decision of the Eighth Appellate District merely addressed the validity of the particular release entered into by the Respondent and the Petitioners herein. As such, the decision of the Eighth Appellate District will not lead to an innundation of claims with the courts. The decision merely follows the law already established by the FELA and the cases interpreting it.

With respect to undermining the incentive to settle work-related claims, Congress, in enacting § 55 of the FELA, explicitly foreclosed the railroads' ability to limit their liability *vis a vis* workers' rights to recover for injuries sustained while working on the railroads. As discussed below, Congress, in enacting § 55, determined that the protection of railroad workers outweighed the railroad employers' ability to negotiate immunity for future liabilities.

The Eighth Appellate District decision properly limited the scope of the release herein and its broad, sweeping language. It does not conflict with existing United States Supreme Court precedent, indicate a split among the lower courts, create a danger of a run on the courts, forum shopping or multiple recoveries. Furthermore, the decision does not change any substantive law, nor does it create new avenues of recovery for claimants. It merely enforces the express provisions of the FELA which prohibit railroads from using releases to obtain blanket waivers of liability.

A. The Decision Of The Court Of Appeals Of Ohio, Eighth Appellate District, Cuyahoga County Is Not In Conflict With United States Supreme Court Precedent.

Petitioners claim that the Eighth Appellate District, by holding that the release is void because it violated 45 U.S.C. § 55, attempted to overrule the United States Supreme Court's decisions in *Mellon v. Goodyear*, 277 U.S. 335 (1928) and *Callen v. Pennsylvania R.R. Co.*, 332 U.S. 625, 631 (1948). As shown below, however, the decision of the Eighth Appellate District does not conflict with or run afoul of either case.

Mellon does not have any application to this case. The holding in *Mellon* was based on its interpretation of 45 U.S.C. § 59, which provides:

> [a]ny right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, **but in such cases there shall be only one recovery for the same injury.** (Emphasis added).

45 U.S.C. § 59.

As the statute plainly provides: "there shall be only one recovery for the same injury." *Id.* In determining the right of a survival action, the emphasis should be on the injury. In *Michigan Central Railroad Co. v. Vreeland*, 227 U.S. 59, 70 (1913). As the *Vreeland* court stated, "the foundation of the right of action is the original wrongful injury to the decedent, * * *

the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." *Id.*; *see also Mellon*, 277 U.S. at 344.

In *Mellon*, the decedent settled his personal injury action with his railroad employer prior to his death. Then his widow tried to bring a survival action based on the *same injury*. The *Mellon* court held that this survival action was barred because the decedent had already recovered in the personal injury claim for that same injury.

The facts of the instant case are distinguishable from *Mellon* and any reliance on *Mellon* herein is misplaced. Lester Anderson's mesothelioma claim involves a separate and distinct injury from the injury claimed in his asbestosis case. Lester Anderson signed a release as part of his personal injury claim for asbestosis. But, this case involves mesothelioma, a separate and distinct injury from asbestosis.[2] Unlike the decedent in

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2. Asbestosis and mesothelioma are separate and distinct diseases. Cancer is a separate disease process from asbestosis. *See Norfolk & Western v. Ayers*, 538 U.S. 135, 174 (2003) (Kennedy, J., dissenting in part); *Lavelle v. Owens-Corning Fiberglass Corp.*, 507 N.E.2d 476, 479 (Ohio Com. Pl., 1987). Asbestosis is a noncancerous scarring of the lungs caused by breathing asbestos fibers. *Norfolk & Western v. Ayers*, 538 U.S. 135 (2003). Mesothelioma, by contrast, "is a rare malignant tumor of the mesothelium of the pleura [lining of the lungs] or peritoneum [lining of the abdominal wall], associated with exposure to asbestos." *See* Mosby's Medical, Nursing & Allied Health Dictionary 1016 (5th ed. 1998). Mesothelioma is a cancerous process; asbestosis is not. Asbestosis and mesothelioma progress independently of each other. Mesothelioma is not an outgrowth or a progression of asbestosis. The vast majority of individuals diagnosed with asbestosis never contract mesothelioma. They are separate and distinct diseases.

Mellon, Lester Anderson had a right immediately before his death to have maintained an action for his wrongful injury, *i.e.*, mesothelioma. Therefore, the *Mellon* analysis is not applicable to Respondent's claim because her claim is not contrary to 45 U.S.C. § 59.

In addition, the *Mellon* court did not even address 45 U.S.C. § 55, the FELA section central to Respondent's claim herein. As shown below, the release signed in 1986 is void as to Mr. Anderson's mesothelioma claim and the general exemptions contained therein because it contravenes 45 U.S.C. § 55. Accordingly, *Mellon* is not relevant in this case.

Petitioners also claim that the decision of the Eighth Appellate District herein impermissibly conflicts with *Callen*, *supra*. In *Callen*, a railroad brakeman, filed a FELA action after injuring his back during the course of his employment with the railroad. The plaintiff brakeman had previously signed a general release and settled the claim in consideration for $250. The general release released "all claims and demands which I have or can or may have against the said Pennsylvania Railroad Co. for or by reason of personal injuries sustained by me." *Callen*, 332 U.S. at 626.

When he signed the release, however, the plaintiff in *Callen* was not aware that his back injury was permanent. The plaintiff in *Callen* brought his FELA claim for this permanent back injury.

The primary issue on appeal in *Callen* was whether the trial judge had improperly withdrawn the question of the validity of the release from the jury. The Court held the trial judge had erred by not allowing the jury to determine the

validity of the release. In the second to last paragraph of its opinion, the *Callen* Court also addressed whether the release violated § 5 (now § 55) of the FELA. In determining whether the release at issue violated § 5 of the FELA, the Court in *Callen* states only that:

> [i]t is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation.

Callen, 332 U.S. at 630.

From these two sentences, Petitioners herein claim that *Callen*, coupled with *Mellon*, "establish that general releases that are executed after the alleged wrongful act in settlement of a claim do not offend the FELA's prohibition against liability exemptions, even if the cause of action has not yet accrued." Petition for a Writ of Certiorari ("Pet.") at 2. Petitioners' claim demonstrates a flawed reading and application of *Callen* and *Mellon*. Further demonstrating their lack of understanding of the *Callen* decision, Petitioners claim that "*Callen* makes clear that where there is a specific injury claim, a bona fide compromise of that claim–including a release of all future claims known or unknown–the release is valid under the FELA." Pet. at 13. But the *Callen* Court simply found that "Congress has not said that parties may not settle their claims without litigation." *Callen*, 332 U.S. at 631. The *Callen* Court did not, in any way, determine that all releases under the FELA are *per se* valid. In fact, if anything, *Callen* made clear only that the

validity of the specific release at issue in that case was a question of fact for the jury to consider. *Id.* at 629.

Furthermore, the Court in *Callen* did not explain what it meant by the phrase that a release "is a means of compromising a claimed liability" or by the phrase "[w]here controversies exist as to whether there is liability." *Id.* at 630. Nowhere in its decision does the *Callen* Court state, or even suggest, as the Petitioners would have this Court believe, that a release for a separate and distinct injury that attempts to exempt the railroad from any and all injuries, known or unknown, whatever the cause, is a valid release under the FELA. Nor does the *Callen* Court state, or suggest, as the Petitioners would have this Court believe, that general releases can be valid for injuries that have yet to accrue.

Callen held that a railroad carrier must not intend to exempt an employer from liability under the FELA but it must be a means of compromising a claimed liability of an existing controversy. The decision of the Eighth Appellate District does not conflict with *Callen*; it merely analyzed the language of the release to determine whether it represented a permissible compromise of a claimed liability of an existing condition, per *Callen*, or whether it was the type of "device" intended to exempt the railroad from liability that is prohibited by 45 U.S.C. § 55.

The decision of the Eighth Appellate District was proper. The Court correctly analyzed the language of the release, and correctly applied this Court's precedent and § 55 of the FELA. The decision did not deviate from, or even call into doubt, this Court's decisions in *Callen* and *Mellon*.

B. The Decision Of The Court Of Appeals Of Ohio, Eighth Appellate District, Cuyahoga County Does Not Represent A Conflict Among The Lower Courts Concerning The Validity Of FELA Releases.

Petitioners further claim that the decision of the Eighth Appellate District represents a mature split among the federal circuit courts concerning the standards to apply to liability release under the FELA. Specifically, Petitioners claim that the Sixth Circuit's "bright-line rule" found in *Babbitt v. Norfolk & Western Railway Company*, 104 F.3d 89 (6th Cir. 1997), is in conflict with the Third Circuit's "approach" found in *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690 (1998), *cert. denied*, 525 U.S. 1012.[3] But, as demonstrated below, this so-called split is artificial and is irrelevant to the case herein as the decision of the Eighth Appellate District would have been the same regardless of which "approach" it utilized.

In fact, the United States Court of Appeals, Third Circuit, in *Wicker* explains that United States Supreme Court decisions dealing with the validity of releases under the FELA are highly fact determinative; and therefore, the United States Supreme Court does not provide a general rule of law in these cases. Specifically, *Wicker* provides:

> rejecting general releases as bars to subsequent claims have been fact-driven, and consequently do not provide a generally applicable rule of law. Although the Supreme Court in *Callen* refused to void the releases executed in compromise of an

3. This Court has previously denied a petition for writ of certiorari filed by Consolidated Rail Corp. in the *Wicker* case. *Consolidated Rail Corp. v. Wicker*, 525 U.S. 1012 (U.S. Nov 16, 1998) (No. 98-193).

> employee's claims, the Court has not had occasion to explain how wide a net its ruling casts.

Wicker, 142 F.3d at 698. In reaching its decision herein, the Eighth Appellate District conducted a proper factual analysis of the claim, and properly determined that the release in question in this particular case was void because it violated § 55 of the FELA.

As *Wicker* makes clear, the application of § 55 to a release is a fact-bound analysis. *Wicker*, 142 F.3d at 700. Furthermore, because these cases are highly fact determinative, the United States Supreme Court has correctly denied to apply a rigid set of rules. Although this absence of a rigid set of rules may lead to some confusion, no such confusion is evident in the decision of the Eighth Appellate District.

Babbitt, *supra*, is the Sixth Circuit case that contains the so-called "bright-line rule." In *Babbitt*, the defendant claimed that its release as part of a "Voluntary Separation Program" (wherein the employees agreed to resign from the company in exchange for a lump sum settlement) served to "buy its peace" from the plaintiffs by getting them to agree to execute a **release of all claims, known and unknown, for which the company may ever be held liable.** *Babbitt*, 104 F.3d at 91 (Emphasis added). The plaintiffs, on the other hand, claimed that the release was void because it violated 45 U.S.C. § 55. The court agreed with the plaintiffs.

In its analysis of the *Callen* decision, the *Babbitt* court determined that a release is valid only when it settles an actual controversy for a plaintiff's specific injuries. *Babbitt*, 104 F.3d at 92. According to *Babbitt*:

> However, where the release was not executed as part of a specific settlement of FELA claims, 45 U.S.C. § 55 precludes the employer from claiming the release as a bar to liability. [Citation omitted.] To be valid, release must reflect a a [sic] bargained-for settlement of a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the employee might have arising from injuries known or unknown by him.

Id. at 93.

The Babbitt court's analysis of *Callen* and § 55 of the FELA is correct and wholly consistent with the language of both. The FELA, in § 55, clearly precludes a railroad employer from using a release to bar itself from future liability. *Callen* held that a railroad carrier must not intend to exempt an employer from liability under the FELA but it must be a means of compromising a claimed liability of an existing controversy.

Furthermore, although *Wicker* refused to adopt the so-called "bright-line rule" adopted by the Sixth Circuit in *Babbitt*, *Wicker*'s approach to analyzing § 55 of the FELA does not represent a split among the circuits. In fact, the *Wicker* court found the releases at issue in that case violated § 55 of the FELA and were therefore invalid. Likewise, in the case herein, the result would be the same under either the Sixth Circuit *Babbitt* "approach" or the Third Circuit *Wicker* "approach."

Even though *Wicker* may allow an employee to release a claim for a known risk, it still cautioned the trial court to

carefully examine the release to ensure it does not violate § 55 of the FELA. Petitioners want this Court to believe that *Wicker* and those cases following the *Wicker* "rule" provide that releases under the FELA are *per se* valid. That is not the case however. As *Wicker* expressly provides:

> we conclude that **a release** may be strong, but **not conclusive, evidence** of the parties' intent. * * * * Furthermore, **where a release merely details a laundry list of diseases or hazards, the employee may attack that release as boiler plate, not reflecting his or her intent.** (Emphasis added).

Wicker, 142 F.3d at 701.

In fact, the Eighth Appellate District, in its analysis, found that the release herein was boiler plate and merely detailed a laundry list of diseases and, like the *Wicker* court, determined the release was invalid.[4] Specifically, the Eighth Appellate District, in discussing the first paragraph of the release herein, stated:

> [t]hus, it is apparent from the plain language of the release that the intent of the release was to exempt appellees from all potential liability related to Lester Anderson's employment. Indeed, appellee American Financial Group admits that 'the original intent of

4. Petitioners claim that the Eighth Appellate district relied on a flawed reading of *Fannin v. Norfolk & W. Ry. Co.*, 666 N.E.2d 291 (Ohio App. 9 Dist. 1995) in reaching its decision. But the *Fannin* court's reading of *Callen* is wholly supportable since *Callen* makes clear that releases are only valid only "where controversies exist." Pet. App. at 11a-12a (*quoting Fannin*, 666 N.E.2d at 295).

> the release was indeed to release any and all future claims.' [citation omitted].

Pet. App. at 10a. Furthermore, the Eighth Appellate District court stated:

> [t]his broad language [of paragraph three, page two of the release] is clearly not a bargained-for settlement of only Anderson's asbestosis claim and injuries related to that claim. Reading this language in conjunction with the very broad language of the first paragraph of the release, it is apparent that the release goes well beyond merely compromising a claimed liability and impermissibly purports to exempt [the railroad] from all 'potential future claims the employee might have arising from injuries known or unknown by him.' *Babbitt*, 104 F.3d at 93.

Pet. App. at 13a.

The release signed by Lester and Shirley Anderson in no way represents a "bargained-for settlement of a known claim for a specific injury." *Babbitt*, 104 F.3d at 93. It actually seeks to do what the *Babbitt* court specifically prohibits: "extinguish potential future claims the employee might have arising from injuries known or unknown." *Id.*

Specifically, the release in paragraph one attempts to waive **"any claims * * * of whatever kind"** relating to Lester Anderson's employment that he **"may now have or hereafter have."** (Emphasis added). In addition, in paragraph two, the release provides that Shirley and Lester Anderson "release and forever discharge" any damages associated with "any other action be determined to be caused" by the Petitioners.

Moreover, paragraph five provides that

> **this agreement includes on behalf of LESTER ANDERSON * * * any claim,** demand, right or cause of action **for injuries**, losses, and damages resulting from or **relating in any manner to exposure to** or ingestion of **any substance whatsoever** including but not limited to asbestos dust * * * **including mesothelioma * * * whether or not presently alleged or manifested.**

(Emphasis added).

Although Petitioners specifically mention mesothelioma in the release, the phrase "whether or not presently alleged or manifested" in paragraph five of the release demonstrates the Petitioners intent to impermissibly limit their liability for future claims, such as mesothelioma, which did not accrue at the time of the release. Furthermore, other language in the release expands its application to **"any claim"** related to asbestos exposure or any other substance, including claims not yet manifest. This broad language does not attempt to reach a bargained-for settlement for a known claim for a specific injury. Instead it impermissibly attempts to exempt the Petitioners' liability for any claim that may lead to any type of injury.

Therefore, the Eighth Appellate District, in conducting its fact-drive analysis, as required, determined the release herein was void because it violated § 55 of the FELA. The result would have been the same under the *Wicker* "approach" or the *Babbitt* "approach." Even if there is split among the federal circuit courts in their "approach" to analyzing releases, any such split is irrelevant and would not result in inconsistent rulings based on the facts of this particular case.

C. The Decision Of The Eighth Appellate District Will Not Further Extend The Already Over-Burdened Asbestos Docket, Undermine Incentives To Settle Claims Or Lead To Forum Shopping.

It is important to note that mesothelioma is "a rare malignant tumor of the mesothelium of the pleura [lining of the lungs] or peritoneum [lining of the abdominal wall], associated with exposure to asbestos." *See* Mosby's Medical, Nursing & Allied Health Dictionary 1016 (5th ed. 1998). Fortunately, only a small fraction of people exposed to asbestos develop mesothelioma. *See* Carbone, M., Kratzke, R.A., Testa, J.R. *The Pathogenesis of Mesothelioma*. Semin. Oncol. 29:2-17, 2002. Furthermore, "[t]here is no demonstrated causal link between asbestosis and cancer." *Ayers*, 538 U.S. 135 at 172 (Kennedy, J., dissenting in part).

Since only a small percentage of individuals who have been exposed to asbestosis actually contract mesothelioma, and an incidence of asbestosis is not casually linked with an incidence of mesothelioma, Petitioners' concern with causing a floodgate of asbestos cases is purely speculative and without merit. Petitioners present no evidence regarding the number of claims it has settled, the circumstances surrounding those releases, or any other evidence that could lend support to their outlandish statement that "[t]he rule adopted [by the Eighth Appellate District] casts thousands (and perhaps tens of thousands) of existing FELA settlements in to doubt and invites forum shopping." Pet. at 4.

The decision of the Eighth Appellate District merely addressed the validity of the particular release entered into by the Respondent and the Petitioners herein. As such, the decision of the Eighth Appellate District will not lead to an

innundation of claims with the courts. The decision merely follows the law already established by the FELA and the cases interpreting it.

Petitioners also claim, again without any evidence in support, that the ruling of the Eighth Appellate District "injects tremendous uncertainly into settlement process prospectively." Pet. at 4. But, Congress, in enacting § 55 of the FELA, explicitly foreclosed the railroads' ability to limit their liability *vis a vis* workers' rights to recover for injuries sustained while working on the railroads. Congress, in enacting § 55, determined that the protection of railroad workers outweighed the railroad employers' ability to negotiate immunity for future liabilities.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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